IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6706 of 1991
with
CIVIL APPLICATION NO.14817 OF 1999
with
SPECIAL CIVIL APPLICATION No 1584, 2693, 3161 of 1992
and
SPECIAl CIVIL APPLICATION NO.3576 OF 1993

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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ARUN CO-OP.HSG.SOC. LTD.

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 6706 of 1991
MR BHARAT J SHELAT for Petitioner No. 1
MR DC DAVE for Petitioner No. 1
Ms.Harsha Devani, AGP for Respondent No. 1-2
MR MIHIR H JOSHI for Respondent No. 3-5
2. Special Civil Application No. 1584 of 1992
MR Anjaria for Petitioner No. 1
Ms.Harsha Devani, AGP for Respondent No. 1
3. Special Civil Application No.2693 of 1992

Mr.Nilesh A.Pandya with Mr.A.N.Parmar for petitioner No.1
Ms.Harsha Devani, AGP for respondent Nos 1-3

4. Special Civil Application Nos.3161/92 & 3576/93
Mr.A.K.Clerk for petitioner Nlo.1
Ms.Harsha Devani, AGP for respondent Nos 1-2

5. Civil Application No.14817/99 in SCA 6706/91
Mr.Harin Raval for applicant
Ms.Harsha Devani, AGP for opponent Nos 2 & 3
Mr.M.H.Joshi for opponents

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 19/08/2002

C.A.V.JUDGEMENT

In all these matters, common questions are involved and, therefore, they are being dealt with together by this common judgment.

2. The petitioners are the Coop.Housing Societies duly registered under the provisions of Gujarat Cooperative Societies Act (hereinafter referred to as "the Act"). When the petitioner-societies were registered, the bye-laws were framed by the concerned petitioner-society which, interalia, provided for the purpose of payment of transfer fees as and when the house constructed over the plot which was allotted by the society is sold by the allottee-member to the new-coming member. There were different bye-laws in respect of different petitinoer-society providing separate quantum of transfer fee which shall be referred to hereinafter.

3. However, on 11.1.1988, the Additional Registrar,Cooperative Societies, Gujarat State issued a circular to all the District Registrars, Cooperative Societies, ASst.Dist.Registrars etc intimating that the existing cooperative societies have normally framed the bye-laws as per the leaflet "U" and since the transfer fee is to be recovered on the basis of difference of the cost to be calculated as per the provisions of bye-laws and the amount realised from the shares there is no uniformity in the said amount. It is also reported that in certain cases huge amounts of transfer fee are being demanded which is causing great difficulty to the seller and purchaser of the house of Housing Society and therefore with a view to have uniformity of the same standards, it is decided by the State Govt after detailed consideration that "the Coop.Housing Society may fix the transfer fee on ad-hoc basis from Rs.500/- to

Rs.10,000/keeping in view their own circumstances." It is intimated in the said circular that when the new societies are registered, it may be ensured that the bye-laws for transfer fee are as per the instructions of the circular. Further it is also communicated by the said circular that keeping in view the provisions of Section 14(1) of the Act read with Rule 7 of the Gujarat Coop.Societies Rules (hereinafter referred to as "the Rules") within a period of three months, the proposal may be called for and the same may be sanctioned as per the instructions contained in the circular for the amendment in the bye-laws. If any society does not forward the proposal or refuses to amend the bye-laws, list of the same may be prepared and be forwarded and so that the matter can be placed before the State Cooperative Council for appropriate decision for amendment in the bye-laws. It is also mentioned in the said circular that the Auditor of the societies may be instructed to verify with the office-bearers that the societies are collecting transfer fee as per the Govt instructions mentioned in this circular.

4. Thereafter, it appears that on 13.2.91 another circular has been issued by the Registrar, Coop.Societies, Gujarat State wherein it has been mentioned that after the circular, dated 11.1.1988 certain Coop.Housing Societies have made the amendment in the bye-laws whereas the majority of the Cooperative Housing Societies have not amended the bye-laws. Therefore, in this regard, representations made by the Cooperative Housing Societies were placed on 17.1.1991 before the State Cooperative Council and the said State Cooperative Council has, after considering all the details, resolved vide resolution No.9 for making provision for uniform transfer fee. In the said circular it has been communicated that the uniform transfer fee should at the rate of 10% of the difference of amount received from shares and the amount invested with interest at the rate of 10% subject to minimum of Rs.500/- and maximum of Rs.50,000/-. Such amount should not be used for the administration of the society but should be credited in the development fund of the society and thereafter be used for the common facilities. It is further communicated that if any amount is fixed by the annual general body or the Managing Committee by lumpsum the same shall not be treated as in operation. In the very circular, it has been also communicated that the bye-laws as per the resolution of the State Cooperative Council should be amended within a period of three months by the existing Coop.Housing Societies keeping in view the provisions of section 14(1) of the Act read with Rule

7 of the Rules, and the society be communicated with the same for forwarding the proposal. If specified societies fail to make the amendment, since the prior approval has been granted by the Cooperative Council, the amendment in the bye-laws be registered and the copy be forwarded as per section 14(2) of the Act so as to bind all the members of the Coop.Housing Societies as per the amended bye-laws. It is also mentioned that while registering the new Coop.Housing Societies, it may be ensured that the bye-laws are registered as per the instructions of the circular and even the Auditors may be instructed to verify that the transfer fee is collected by the office bearers of the societies accordingly. These aforesaid two circulars, dated 11/1/1988 and 13/2/1991 are the main basis of challenge and cause of these petitions.

SPECIAL CIVIL APPLICATION NO.6706 OF 1991:

5. The petitioner-Arun Coop.Housing Society Ltd had the existing Bye-law No.6-A of Form B of Leaflet "U" which reads as under:

"6-A. On every permitted disposition or devolution of or dealing with the said plot and buildings or any part thereof under or by virtue of these regulations the member shall pay to the society half the premium received by him from the purchaser member in respect of the said plot and shall also pay to the society in case of the said plot and building half of the amount received by him over and above the capital cost with interest at 4 and 1/2% p.a. upto a limit of one third of the capital cost and such payments received by the society shall belong to the society absolutely and carry to reserve fund."

The society in its meeting, dated 27.2.90 resolved for amendment of bye-law No.6-A as under:

"It is resolved that the existing rule (bye-law) 6A of Form B of Leaflet "U" of the bye-laws of the society is hereby deleted and read, in its place, as under:

"On every permitted disposition or devolution of or dealing with the said plot and/or buildings or any part thereof and/or any interest therein,under or by virtue of these regulations and a member on communicating the sale price to the society and the society accepting the same, the member shall pay to the society

10% (ten percent) of the sale price receivable by him in respect of the said plot and/or buildings or any part thereof and/or any interest therein and such payments received by the society shall belong to the society absolutely and carry to reserve fund."

6. The case of the petitioner is that on 17.3.90 the application for amendment in the bye-laws was submitted by the petitioner to the District Registrar and the same has been rejected as per the decision, dated 24.5.90 whereby the deletion of existing bye-laws is permitted but the amendment in the bye-laws is not permitted. The petitioner society carried the matter before the appellate authority being the Additional Registrar (Appeals) whereby the appeal is partly allowed by rejecting the proposal for deletion and amendment in the byelaws and therefore as a result thereof the earlier bye-laws prior to the amendment was restored, but the appellate authority observed that "when the State Coop.Council has resolved in the larger interest of the cooperative activities the amendment suggested by the society for substitution of bye-laws in its meeting dated 27.2.90 can not be accepted and therefore the amendment in the bye-laws is not permitted." It appears that the matter was carried before the State Govt by way of revision by the petitioner society and on 5.6.91 the State Govt has confirmed the order of the appellate authority by rejecting the revision. It appears that, in the meantime, on 23.4.91 a notice is issued by the Dist.Registrar, Coop.Societies, Ahmedabad City to the petitioner society for amendment in the bye-laws. It is true that in the said notice there is no reference to the circular dated 13.2.1991. However, the amendment suggested is as per the said circular which is issued in addition to the resolution of the State Coop.Council. The society has replied to the said notice as per letter dated 17.6.91 contending, interalia, that such amendment in the existing bye-laws is not in the interest of the society. On 6.7.91 the District Registrar, once again, addressed a letter instructing the society to call the annual general meeting for the purpose of proposed amendment in the bye-laws. The society thereafter insisted for the supply of circular on the basis of which the notice was issued but ultimately on 29.7.91 the order has been passed by the Dist.Registrar, Coop.Societies, Ahmedabad city that the by-law No.6-A of the society shall stand amended as per section 14(2) of the Act. Under the circumstances, the petitioner has challenged the order rejecting the amendment in the bye-laws by the District Registrar and its confirmation by the appellate

authority.

SPECIAL CIVIL APPLICATION NO.1584 OF 1992:

7. The petitioner-Adarsh Coop.Housing Society Ltd registered on 30.9.1949 was having Bye-law No.6A as that of the petitioner-society of Special Civil Application No.6706/91, i.e. Arun Coop.Housing Society Ltd. It appears that on the basis of circular dated 11.1.1988 the District Registrar, Surat forwarded a circular dated 23.2.1988 to the petitioner-society calling upon the proposal for amendment, however, the society forwarded proposal for amendment for collecting "Salami" and therefore when said proposal for amendment was not sanctioned by the District Registrar, the society was communicated regarding the same as per letter dated 22.1.1990. Thereafter, again on the basis of circular, dated 13.2.1991 the District Registrar addressed letter dated 1.1.1992 to the petitioner society and communicated that as required by the earlier circular dated 8.3.91 the society was also communicated for forwarding the proposal for amendment in the bye-laws in conformity with the circular, dated 13.2.1991 but no proposal is forwarded and therefore in exercise with the powers under section 14(2) of the Act the society is communicated that the By-law 20-D shall stand amended as per the circular dated 13.2.1991 for charging the transfer fee of minimum Rs.500/- to maximum Rs.50,000/-. Under those circumstances, the petitioner society has preferred this petition challenging the legality and validity of the order dated 1.1.1992.

SPECIAL CIVIL APPLICATION NO.2693 of 1992:

8. The petitioner-Shreejeebaug Coop.Housing Society Ltd which is registered on 31.8.1966 in its meeting dated 28.9.86 vide resolution No.9 resolved for charging Rs.7,000/- as the transfer fee to be collected from the outgoing member. It appears that on the basis of circular dated 13.2.1991 the District Registrar, Ahmedabad issued notice dated 10.5.91 for forwarding the amendment in the bye-laws so as to bring in conformity with the aforesaid circular. The society in its general body meeting dated 30.6.91 considered the matter and out of 13 members present, 12 opposed the resolution and one person remained neutral and therefore the resolution was not passed. Thereafter, on 23.8.91 the District Registrar under section 14(2) of the Act passed an order that the bye-law shall stand amended for the purpose of charging the transfer fee as per circular dated 13.2.1991, namely, difference of 10% subject to minimum

of Rs.500/- and maximum of Rs.50,000/-.

SPECIAL CIVIL APPLICATION NO.3161 of 1992:

9. The petitioner-New Brahmakshatriya Coop.Housing Society Ltd which came to be registered under the provisions of the then Bombay Cooperative Societies Act, 1925, after Gujarat Cooperative Societies Act, 1961 came into force, adopted bye-law No.6A of leaflet "U" and the said bye-laws interalia provided for transfer fees. The society in its meeting dated 22.1.1986 resolved for amendment in the bye-law No.6A which reads as under:

> "On every permitted disposition or devolution of or dealing with the said plot and buildings or any part thereof under or by virtue of these regulations the member shall pay to the society one-eighth the premium received by him from the purchaser member in respect of the said plot and shall also pay to the society in case of the said plot and building one-eighth of the amount received by him over and above the capital cost with interest at 5 and 1/2% p.a. upto a limit of one third of the capital cost and such payments received by the society shall belong to the society absolutely.
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> "Provided however when a member submits plans for construction of a building of ownership flats, the member shall agree to pay to the society, the premium as above, calculated on the basis of fair and reasonable market value of the plot, or the plot and building standing thereon. as the case may be, as of the date on which the plans are submitted to the society and the said premium shall be paid by the member, before the completion certificate is obtained from the Municipal Corporation with consent of the society and provided further that the amount of premium shall be a change on the plot until it is paid."

The said amendment came to be granted on 5.1.1988. However, thereafter, on 14.3.88 the District Registrar, Ahmedabad communicated to the society that in response to the proposal dated 6.5.88 of the society for amendment in the bye-laws since instructions are issued by the Registrar, Cooperative Societies, Gujarat State for fixing the transfer fee of Rs.500/- to Rs.10,000/- the proposal for amendment be forwarded accordingly. The society as per its letter dated 6.4.88 made a detailed

representation and submitted that it is not possible for the society to make amendment in the bye-laws and communicated for reconsideration of the proposal dated 6.5.87. In any event, the contention of the petitioner-society is that in respect of the said circular dated 11.1.1988 on 12.1.1989 the petitioner was communicated for amendment in the bye-laws as per its meeting dated 5.4.1987 and the bye-law which is sanctioned reads as under:

"On every permitted disposition or devolution of or dealing with the said plot and buildings or any part thereof under or by virtue of these regulations the member shall pay to the society one-eighth the premium received by him from the purchaser member in respect of the said plot and shall also pay to the society in case of the said plot and building one-eighth of the amount received by him over and above the capital cost with compound interest at 6% (six percent) per annum with yearly rests and such payments received by the society shall belong to the society absolutely.

"Provided however when a member submits plans for construction of a building of ownership flats, the member shall agree to pay to the society, the premium as above, calculated on the basis of fair and reasonable market value of the plot, or the plot and building standing thereon. as the case may be, as of the date on which the plans are submitted to the society and the said premium shall be paid by the member, before the completion certificate is obtained from the Municipal Corporation with consent of the society and provided further that the amount of premium shall be a change on the plot until it is paid."

It is the case of the petitioner society that after the aforesid sanction was communicated on 4.10.1990 the District Registrar intimated by notice to the society that inspite of earlier communication the society has not amended the bye-laws for charging the transfer fee of Rs.500/- to Rs.10,000/- and therefore the instructions are defied and an opportunity was given to the society to submit explanation within 15 days failing which the proposal shall be forwarded for appropriate decision to the Gujarat State Cooperative Council. On 6.12.1990, the society made a representation stating that the sanction

as per the proposed bye-laws is already granted on 17.9.81 and therefore now there is no question of amending the same as per circular dated 4.10.1990. Thereafter, the District Registrar once again addressed a letter on 28.4.1991 intimating to the society to amend the bye-laws as per circular dated 13.2.1991 for charging the transfer fee at the rate of 10% of difference subject to Rs.500/- and maximum of Rs.50,000/- etc. The society, once again, addressed letter dated 13.5.91 to the District Registrar making detailed representation and submitted that the society is not bound to amend the byelaws as required by the District Registrar. Thereafter, there were various correspondences between the society and the District Registrar, Ahmedabad, and ultimately, the District Registrar passed the order on 23.8.91 under section 14(2) of the Act whereby he has ordered that the bye-law shall stand amended. Under the circumstances, the said society has preferred the petition challenging the legality and validity of the aforesaid order of the District Registrar.

SPECIAL CIVIL APPLICATION NO.3576 OF 1993:

10. The petitioner-Hindu Colony Coop.Housing Society Ltd came to be registered under the then Bombay Cooperative Societies Act also adopted mainly the bye-law No.6A of Leaflet "U" but it provided subsequently for the charging of transfer fee at the rate of Rs.50/- per Sa.Yard. Said amendment in the byelaw came to be sanctioned on 15.1.1983. Thereafter, on 18.8.92 the District Registrar communicated to the society for amendment in the bye-laws providing for charging of transfer fee at the rate of 10% of difference subject to minimum of Rs.500/- and maximum of Rs.50,000/- so as to bring in conformity with the aforesaid circular of the District Registrar. It appears that the society did not forward the proposal for amendment in the bye-laws and therefore on 29.6.92 the District Registrar passed the order under section 14(2) of the Act intimating that the bye-law shall stand amended as mentioned in the said order which is in conformity with the circular dated 13.2.1991. Under the circumstances, the petitioner has approached this court challenging the legality and validity of the order dated 26.6.92 under section 14(2) of the Act.

11. Mr.D.C.Dave for the petitioner in Special C.A.No.6706/91 has mainly contended that the power under section 13(2) of the Act provides that it is obligatory for the Registrar to sanction the amendment in the bye-laws if it is not in conformity with the provisions

of the Act or the Rules and, therefore, he submitted that the word "may" as provided under section 13(2) of the Act should be read as "shall". He also contended that as per the scheme of Section 13(2) of the Act the Registrar has to form an opinion regarding the desirability or necessity of bye-laws in the interest of the society and while forming the opinion, in his submission, the Registrar can not take into consideration anyother item except those which are provided under Rule 5 of the Rules and, therefore, he submitted that the Rule 5 does not provide for making provision for charging the transfer fee and therefore in his contention the power has been exercised beyond the scope and ambit of Section 14 of the Act. Mr.Dave also submitted that what is desirable or necessary in the interest of the society can only be decided by the general body of the society and the District Registrar can not decide the said aspect and, in any case, in his submission when the general body of the society resolved for not to amend the bye-laws since it was found by the general body that it is not necessary in the interest of the society, the District Registrar can not super-impose his decision that it is in the interest of the society by passing order under section 14(2) of the Act. Mr.Dave has relied upon the judgment of the Apex Court in the matter of The State of Maharashtra vs Karvanagar Sahakari Griha Rachana Sanstha Maryadit reported in 2000(3) GLH 191 and also the judgment of the Division Bench of this court in the matter of Jagdishbhai Bhimrao Setalvad vs New Brahma Kshatriya Coop.Housing Society Ltd reported in 2001(3) GLH 326 for supporting his submission that what is in the interest of the society can only be decided by the general body of the society which is the final authority. Mr.Dave has also submitted that in any case before exercising powers under sections 13 & 14 for directing the amendment in the byelaws, it is obligatory for the Registrar to give opportunity of hearing to the concerned society since such opportunity of hearing has not been given the decision is vitiated. Mr.Dave also relied on the judgment of the Division Bench of the Bombay High Court in the matter of The Telangkhedi Coop.Dairy Society Ltd, Nagpur vs The Dy.Registrar, Coop.Societies, Nagpur reported in AIR 1958 Bom.330.

12. Mr.Anjaria, learned counsel appearing for the petitioner in Special Civil Application No.1584/92 mainly contended that the opportunity in any case is required to be given before passing the order under section 14(2) of the Act and he submitted that no opportunity of hearing has been given to his clients. He also contended that the general approval of the State Gooperative Council in

respect of the Cooperative Housing Societies of Gujarat State is not contemplated as per the scheme of Section 14(2) of the Act. He submitted that subsection (2) of Section 14 provides for prior approval and even when such approval is granted the Registrar has to independently apply his mind and then take decision as to whether the order should be passed for amendment in the byelaws or not. Mr.Anjaria also submitted that there is no rational for amendment in the byelaws since such amendment in the byelaws is not in the interest of the members of the Cooperative Housing Society. He submitted that there is no logic in putting the restriction upon the power of the society to charge transfer fee and in his submission the consideration or deprivation which is mentioned in the circulars which are under challenge are irrelevant for the purpose of exercising of power under section 14(2) of the Act. Mr.Anjaria adopted the submissions made by Mr.Dave for the purpose of contending that what could be in the interest of the society. However, he submitted that in a cooperative housing society there is doctrine of mutuality and the existence of the bye-law can not be decided from the stand point of individual member but since there is no element of profit making there is no logic in putting the restriction and Mr.Anjaria also relied on the judgment of this court in the matter of Commissioner of Income Tax vs Adarsh Coop.Housing Society Ltd reported in 213 ITR 677 to contend that under Income Tax Law also the question of transfer fee is not considered as a profit on the principles of mutuality and therefore it should better be decided by the members themselves and not by the Registrar. Mr.Anjaria also lastly submitted that in any case for each society considering the location, financial condition etc the separate opportunity be given and independent opinion should be formed and a separate approval must be obtained which has not been done in the present case and therefore the order under section 14(2) of the Act is in his submission without following the mandatory procedure and hence illegal.

13. Mr.Pandya appearing for the petitioners in Special Civil Application No.2693/92 has adopted the contentions raised by Mr.Dave and Mr.Anjaria. However, he submitted that if 10% of difference of amount is to be collected subject to minimum of Rs.500/- and maximum of Rs.50,000/- his clients will get less income in comparison to the existing decision of the society to charge Rs.7,000/- as transfer fee.

14. Mr.A.K.Clerk, learned counsel appearing for petitioners in Spl.C.A.Nos 31613161/92 and 3576/93

contended that having registered the amendment in the byelaws in exercise of quasi judicial powers under section 13(2) of the Act the power gets exhausted and thereafter it is not open to the Registrar to direct the society either to recall the earlier order or to amend the byelaws which nullifies the earlier order for sanctioning the byelaw. Mr.Clerk submitted that the affidavit in reply filed on behalf of respondents clearly shows that the contention raised on behalf of the District Registrar as well as the State Registrar is that the earlier decision is taken for directing the amendment in the byelaws. However, he submitted that the petitioners are not challenging the earlier decision where the Registrar has no power to give such direction in general to all Cooperative Societies of the State for amendment in the byelaws. He submitted that as per the scheme of Section 13 read with Section 14 of the Act the powers of the Registrar for sanctioning or directing for amendment in byelaws are that of quasi judicial authority and therefore neither the State Govt nor the State Cooperative Council has power to give such direction to quasi judicial authority. He submitted that the State Cooperative Council has power of making recommendations only but such recommendations issued in the nature of giving directions to quasi judicial authority are illegal in his submission. Mr.Clerk has relied on the judgments of the Supreme Court in the matters of (i) Anirudhsinhji Karansinhji Jadeja vs State of Gujarat reported in (1995) 5 SCC 302, (ii) B.Rajagopala Naidu vs The State Transport Appellate Tribunal, Madras reported in AIR 1964 SC 1573, (iii) Orient Paper Mills Ltd vs Union of India reported in AIR 1969 SC 48 to contend that no directions/instructions could be issued by the State Govt to the Registrar who is exercising quasi judicial power. Mr.Clerk also submitted that the ground of public interest on the basis of which the power is sought to be exercised is extraneous to the provisions of section 14 because in his submission the primary interest of the society or its members is to be considered and not the public interest.

THE STAND OF THE STATE GOVT:

15. On behalf of the District Registrar an affidavit in reply is filed in Spl.C.A.No.6706/91 and it has been stated at Bar that this is a common stand or rather defence of the District Registrar and the State Govt in all these petitions. It has been contended, interalia, on behalf of the respondents that initially the purpose of charging the transfer fee was to create a fund for

maintaining the roads, drainage, lights etc as in those days the corporation/municipality was not levying the betterment charges for the same. Therefore, the societies were charging 50% of the sale proceeds as transfer fees. It is also stated that in view of the old byelaws the societies have collected huge sums till today. But, now the corporation/municipality provides these facilities and, therefore, there is no need to collect huge amounts from the members for reserve funds for using the same for the purpose of drainage, lights, roads etc. It is submitted that the societies are also separately charging maintenance charges for maintaining the common facilities of the societies from the members. It is further stated that it had come to notice that the huge amounts collected from the members are not utilised in the interest of the members and therefore after taking all the aspects into consideration the State Govt came to conclusion that a uniform policy should be adopted in the matter of transfer fees charged by the cooperative housing societies and therefore the State Govt in public interest and for preventing the affairs of the society being conducted in the manner detrimental to the interests of the members by letter dated 19.10.1987 directed the Registrar to fix the ad-hoc amount of transfer fee ranging from Rs.500/- to Rs.10,000/-to be charged by the societies looking to the status, circumstances etc of the societies. It has been submitted that it has further directed the Registrar to see that the cooperative housing societies amend their byelaws so as to bring in consonance with the decision of the State Govt. It is also submitted that after the circular dated 11.1.1988 notice has been issued to the all cooperative housing societies to amend their byelaws but except few societies most of the societies declined to amend the byelaws and the societies had made representations and also certain suggestions for amending the circular. It has been submitted that the State Cooperative Council in its meeting held on 17.1.1991 took the representations of the societies into consideration and passed the amendment at Item No.9 of the agenda on the basis of which the circular dated 8.3.1991 has been issued. It has been submitted that the aforesaid instructions bear out the policy of the State Govt to make the charging of transfer fee by the cooperative housing societies uniform all over the State in the interest of members of the societies and the aforesaid decision has been taken after due consideration and deliberations and has a reasonable nexus with the object sought to be achieved and hence the said decision is just, proper, legal and is in the larger public interest.

16. On behalf of the State Govt and the District Registrar, Ms.Harsha Devani, Ld.AGP has submitted that even if the byelaws are not in contravention to the provisions of the Act or Rules the Registrar has the discretion and such proposed amendment in the byelaws can be refused by the Registrar exercising powers under section 13(2) of the Act. She has relied on the judgment of this court in the matter of Guj.State Coop.Bank Ltd vs State of Gujarat reported in 2002(1) GLH 9 in support of her above submission that hearing was not required to be given since State Coop.Council considered all the representations and ultimately resolved for amendment in the byelaws. She submitted that the State Govt has power to even grant exemption to any society from the applicability of the provisions of the Act and, therefore, it can not be said that the circular is issued without there being any authority on the part of the State Govt. She submitted that the judgment of the apex court upon which reliance is placed on behalf of the petitioners, namely, State of Maharashtra (supra) was a cas where the nature of the society came to be changed, namely, from residential use it was being changed to commercial use and, therefore, the said judgment can not be made applicable to the present case. She submitted that the circular has been issued by the State Govt in the present case with a view to prevent the exploitation of the minority at the hands of majority and she submitted that once the State Cooperative Council itself has resolved for amendment in the byelaws there was not question of obtaining prior approval. She also submitted that under section 156(3)(e) of the Act the State Coop.Council has to forward the opinion on matters which are referred by the State Govt and it has happened in the present case and therefore it can not be said that the State Coop.Council has exceeded its power and the resolution of the State Coop.Council is illegal, in any manner. She also submitted that the power under section 14 of the Act of the Registrar can not be said to be a quasi judicial power and it confers the powers on the Registrar which are executive in nature and said intention is apparent since subsection (2) of section 14 provides for prior approval of the State Coop.Council. She submitted that the words "in the interest of such society" have to be read as being both in singular and plural also. Therefore, when registrar gives any direction in respect of cooperative societies, individual society can not make any grievance about it.

The learned AGP has tried to show that the judgment upon which the reliance is placed on behalf of

the petitioners is in different fact situation and therefore same would not be applicable to the present case.

17. In view of the above, the points which arise for the consideration of this court, in my view, are as under:

(i) Whether the impugned circular can be said to be a policy decision of the State Govt or not?

(ii) What will be the effect of the said circular upon the Dist.Registrar exercising powers under section 13 or 14 of the Act, as the case may be?

(iii) Whether the wholesome exercise of power by the Dist.Registrar on the basis of circular without examining the facts and circumstances of the concerned society can be sustained in the eye of law or not?

18. Concentrating upon the first point and certain provisions of the Act, as per the stand of the State Govt, it appears that the circular has been issued in exercise of powers under section 160(1) of the Act. Sections 160(1) & (2) of the Act read as under:

"160(1) If the Registrar of his own motion or otherwise is satisfied that in public interest or for the purpose of securing the proper implementation of cooperative production and other development programs approved or undertaken by the State Govt or for linking and coordinating of cooperative activities such as marketing and credit, or securing the proper management of the business of the society generally or preventing the affairs of the society being conducted in a manner detrimental to the interest of the members, or of the depositors or the creditors thereof, it is necessary to issue directions to any class of societies generally or to any society or societies in particular, he may issue directions to them, from time to time, and all societies or the society concerned, as the case may be, shall be bound to comply with such directions.

(2) The Registrar may of his own motion or otherwise modify or cancel any directions issued under subsection (1) and in modifying or cancelling such directions he may impose such

conditions as he may deem fit."

The aforesaid section enables the Registrar in public interest for securing the proper management of society general or for preventing the affairs of the society being conducted in a manner detrimental to the interest of the members of the society has power to issue direction to all the societies or a society concerned, as the case may be.

Subsection (2) of Section 160 enables the Registrar to modify or cancel the directions issued under subsection (1).

Section 161 of the Act is providing for the power of the State Govt to pass general or special order exempting any society or class of societies from the provisions of the Act with or without modification as provided under the said section.

The proviso of section 161 of the Act shows that no order to the prejudice of any society shall be passed without an opportunity being given to such society to represent its case. Therefore, it can not be said that the power under section 161 is purely a legislative action. At the same time, exercise of power under section 160 of the Act on the part of the Registrar shows that the Registrar has power to issue directions and the Registrar has also power to modify such directions or cancel or recall the directions may be upon representation of the society or otherwise as per section 160(2) of the Act.

19. A perusal of the first circular dated 11.1.1988 shows that the aforesaid circular has been issued in general on the basis of the State Govt letter dated 19.10.1987 and the intention appears to be to have uniform transfer fee for all cooperative housing societies in the State. It has come to notice of the department that huge amounts of transfer fees are demanded either on the basis of existing byelaws or otherwise and as a result thereof the persons who sell the house and the persons who purchase the house are facing difficulties. It is also mentioned in the said circular that after consideration the State Govt has decided to provide for fixing uniform policy of transfer fee which the society may decide keeping in view its circumstances from Rs.500/- to Rs.10,000/-. It also provides that the new housing societies must be registered providing the same type of byelaws. Therefore, one fact is clear that the directions of

circular dated 11.1.1988 are on the basis of decision of the State Govt. A perusal of circular dated 13.2.1991 shows that the matter was again placed before the State Coop.Council and it is resolved vide resolution N.9 for providing transfer fee on uniform basis at the rate of 10% of difference subject to minimum of Rs.500/- and maximum of Rs.50,000/- and utilisation of said amount for common facilities etc. It has been recorded in the said circular that the amendment of byelaws as per resolution of the State Coop.Council is necessary in the interest of cooperative housing society. In view of the same, the Registrar has instructed the District Registrar for taking steps as per section 14 of the Act. Therefore, the intention in issuing the circular appears to be in the larger public interest and in view of the resolution of the State Coop.Council. As per the scheme of the Act and more particularly keeping in view the provisions of sections 160 and 161 of the Act it can not be said that the State Govt has no power to issue instructions nor can it be said that the Registrar has no authroity to issue the circular or give instructions/directions as contained in the said circular. Therefore, I am of the view that the impugned circular on the basis of the decision of the State Govt and on the basis of the resolution of the State Coop.Council can be said to be a policy decision of the State Govt.

20. The aforesaid takes me to examine the effect of circular on Dist.Registrar while exercising the powers under sections 13 & 14 of the Act. Sections 13 & 14 of the Act read as under:

"13(1) No amendment of the byelaws of a society shall be valid until registered under this Act. For the purpose of registration of an amendment of the byelaws, a copy of the amendment passed, in the manner prescribed, at a general meeting of the society, shall be forwarded to the Registrar.

(2) If the Registrar is satisfied that the amendment so forwarded is not contrary to this Act, or the rules, he may register the amendment.

Provided that no order refusing to register the amendment shall be passed except after giving the society an opportunity of being heard.

(3) When the Registrar registers an amendment of the bye-laws of a society, he shall issue to the society a copy of the amendment certified by him, which shall be conclusive evidence of its

registration.

(4) When the Registrar refuses an amendment of the byelaws of a society, he shall communicate the order of refusal, together with his reasons thereof, to the society.

14(1) If it appears to the Registrar that an amendment of the bye-laws except in respect of the name or objects of a society is necessary or desirable in the interest of such society, he may call upon the society, in the prescribed manner, to make the amendment within such time as he may specify,

(2) If the society fails to make the amendment within the time so specified, the Registrar after giving society an opportunity of being heard and with the prior approval of the State Cooperative Council, may register the amendment and shall thereupon issue to the society a copy thereof certified by him. With effect from the date of the amendment in the manner aforesaid, the byelaws shall be deemed to have been duly amended accordingly, and the byelaws as amended shall be binding on the society and its members."

It is true that the language of subsection (2) of section 13 is that "if the Registrar is satisfied that the amendment so farwarded is not contrary to the Act or rules, he may register the amendment". However, the use of word "may" by the legislature itself shows the intention of the legislature to keep the discretion upon the Registrar to register the amendment. At this stage, it would be worthwhile to refer to the decision of this court in Gujarat State Coop.Bank Ltd (supra). In the said decision, at para 9 while construing the provisions of subsection (2) of Section 13 the court observed as under:

"However, the legislature which is not unfamiliar with the negative language as would be found in so many provisions of various legislations, has conferred the power on the Registrar in the positive terms that the Registrar 'may' register the amendment if he is satisfied that the amendment is not contrary to the Act or the Rules. Hence, what the legislature has provided is that the amendment being not contrary to the Act or to the Rules is the condition precedent

> or the first requirement before the Registrar can exercise his discretion for registering the amendment. The discretion to register or not to register the amendment of a byelaw would involve weighing the pros and cons of several relevant facts. The only limiting factor on his power would be that the considerations to be weighed by the Registrar shall not be inconsistent with the Act or the Rules."

21. Therefore, I can not agree with the submission made by Mr.Dave that the word "may" is to be read as "shall" and therefore the said contention of Mr.Dave deserves to be rejected. The requirement while refusing to register the amendment in the byelaws as provided by the legislature is that an opportunity of hearing shall be given to the society concerned.

22. So far as the power of the Registrar under section 14(1) of the Act is concerned, it provides that "when it appears to the Registrar that an amendment in the byelaws is necessary or desirable in the interest of society, he may call upon the society to amend the byelaws. Therefore, if the powers under section 13(2) of the Act are read and compared, vis-a-vis, the powers under section 14(1) of the Act, it provides that the consideration for registering the amendment in the byelwas should not be necessarily the same as that of direction to amend the byelaws. In law, for giving direction to amend the byelaws the requirement is that the necessity or desirability of such amendment in the interest of the society. Subsection (2) of section 14 provides that "if the society fails to make the amendment within the time specified, then the Registrar may after giving opportunity of hearing and with the prior approval of the State Cooperative Council register the amendment." Therefore, while giving direction under section 14(1) of the Act primafacie satisfaction of the Registrar for directing such amendment in the byelaws is required whereas while passing order under section 14(2) of the Act the final satisfaction of the Registrar after giving opportunity of hearing to the society concerned and after prior approval of the State Coop.Council is required. The scheme of section 14 itself provides that an opportunity of being heard is a must before passing the final order directing the registration of the amendment in the byelaws. At this stage, it is necessary to refer to the decision of the Division Bench of the Bombay High Court in the case of The Telangkhedi Coop.Dairy Society Ltd (supra) wherein at para 8 of its decision the Division Bench of Bombay High Court observed as under:

"The Registrar may take one view. It is possible that the society may take another. What is contemplated under the Act is that after the failure of the society to carry out the orders of the Registrar there should be an exchange of views between the Registrar and the society before a final action is taken under subsection (5). This in the instant case has not been done."

The Division Bench, in the same paragraph has further observed as under:

"What is contemplated in our view is a hearing after the refusal of the society to incorporate the amendments within the time mentioned in the order made under subsection (4) of section 11."

23. The aforesaid clearly goes to show that while exercising the power under section 14(2) of the Act if the society refuses to comply with the directions under section 14(1) of the Act the Registrar has to give an opportunity of hearing to the society concerned and thereafter has to arrive at a finding that such an amendment in the byelaws is necessary or desirable in the interest of the society. What can be the interest of or desirability in the interest of a particular society is to be decided objectively on the facts and circumstances of the case of each society. Since there is procedure of taking decision after giving opportunity of hearing to the concerned society and since there is an element of taking decision objectively on the facts and circumstances of each society and since such a final decision taken under section 14(2) of the Act is also subject to the revisional jurisdiction of the higher authority under section 155 of the Act, I am of the view that the powers under section 14(2) of the Act are quasi judicial in nature. There is one additional reason for arriving at such a conclusion because the Registrar may direct for amendment in the byelaws which may result into adversely affecting the financial position of the society or otherwise.

24. It is well settled that when the Act confers powers upon the authority which are quasi judicial in nature then in such circumstances administratively the higher officer or authority can not issue the instructions/directions so as to make such instructions/directions as binding or to be scrupulously followed which results into taking away the discretion

vested in the quasi judicial authority. However, at the same time, the instructions or the directions issued by the higher administrative authority can, at the most, be one of the considerations for exercising the discretion. It may be that in a given case for the valid reasons upon the facts and circumstances of the particular case, the quasi judicial authority may take a different view and therefore Mr.Clerk is not fully right in his submission that the higher authority, namely, the State Govt or the State Registrar has no authority to issue such circulars or instructions by way of circulars. However, Mr.Clerk is right in his submission that such instructions or directions issued by circulars are not binding to the Registrar who is acting as a quasi judicial authority while passing the order under section 14(2) of the Act. It may be that on account of said circulars, the Dist.Registrar may be, primafacie, justified in exercising power under section 14(1) of the Act. However, while passing the final order under section 14(2) of the Act such circulars are to be treated as only directory and not mandatory because ultimately it will be for the District Registrar to arrive at a final decision objectively upon facts and circusmtances of each society, its location, its financial position etc and to finally conclude as to whether such amendment is necessary or desirable in the interest of the concerned society or not.

25. In view of the aforesaid discussion, the effect of circulars, dated 11.1.1988 and 13.2.1991 are only directory in nature and the same can not be read as binding to the concerned District Registrar who has to pass final order under section 14(2) of the Act.

26. As discussed earlier, the nature of power under section 14(2) of the Act is quasi judicial and therefore for each society the Registrar will have to satisfy himself regarding the necessity or desirability and the interest of the each society while passing the final order under section 14(2) of the Act.

27. At this stage, it would be necessary to deal with the contention raised on behalf of the petitioners that what could be necessary or desirable in the interest of the society is with the general body of the society and the Registrar or the authority can not superimpose its decision or opinion regarding the necessity or desirability of the interest of such society. IN case of State of Maharashtra (supra) the facts were that the State Govt had directed for amendment in the byelaws to enable the plot-holders to construct multistoreyed

building with more than one residential tenement on their plots and to form a society of the owners of the flats of the multistoreyed buildings which shall be a member of the Housing Society and be represented by its representative in the housing society. By virtue of said directions amendment which was proposed to be brought out was resulting into commercialisation of use of the plots in residential area. By such amendment in the byelaws a membership of a new society of the owner of the plot was to be treated as a member and therefore in the facts of said case the Apex Court at its para 6 observed as under:

> "We are unable to say that the amendment directed by the Government is in the interest of the society."

Therefore, the learned counsel for the petitioners are not right in submitting that the aforesaid decision of the Apex Court lays down the absolute proposition that what is in the interest of the society can only be decided by a majority of the members of the society and none else.

28. In case of Jagdishbhai Bhimrao Setalvad (supra) when the transactions had entered into the byelaws upon which reliance was placed before the original petitioner was not in force. It is also recorded by the Division Bench of this court in its judgment at para 5 as under:

> "There is no material to on record to indicate that the procedure under subsection 14(2) was followed qua the respondent-society."

Therefore, the learned counsel for the petitioners are not right in submitting that the decision of the Division Bench of this court in the aforesaid matter of Jagdishbhai Bhimrao Setalvad lays down any absolute proposition that it is only the society which has alone power to decide about its interest. There is one additional reason for not accepting the contention of petitioners that the interest of the society is only for the general body of the society to decide and none else. If such contention is accepted the whole scheme of Section 14 would rendered nugatory and it would rather nullify the effect of power of the Registrar under section 14 of the Act. First the Registrar takes a tentative view under section 14 of the Act regarding the necessity or desirability for amendment in the byelaws in the interest of the society and if the society declines or rather does not agree with the tentative opinion or the view of the Registrar then only section 14(2) of the

Act comes into picture. If the general body of the society is alone the authority to take decision regarding the amendment in the byelaws from the view point of necessity or desirability in the interest of the society, then there is no reason for the legislature for making provisions under section 14(2) of the Act. On the contrary, when the general body of the society declines to or rather fails to make the amendment as communicated by the Registrar under subsection (1) subsection (2) of section 14 of the Act would start operating. Therefore, as per the scheme of the Act, it can not be concluded that the general body of the society is alone to decide regarding the necessity or desirability of the interest of the society. Therefore, the aforesaid contention raised by the learned counsel for the petitioners can not be accepted and rather it would run counter to the provisions of section 14(2) of the Act.

29. The legislature has further provided under section 14(2) of the Act regarding prior approval of the State Cooperative Council. The intention appears to have a further check upon the power of the Registrar before passing final order of registering the amendment in the byelaws. Therefore, it appears that after hearing the concerned society keeping in view the fact situation of each case if the Registrar objectively forms an opinion of directing to amend the byelaws then the proposal for approval shall be forwarded by the Registrar to the State Cooperative Council which will consider each case for directing to amend the byelaws separately and shall take decision for grant of approval. If the approval is granted, then the Registrar would be justified in passing the final order of registering the amendment in the byelaws.

30. The aforesaid discussion clearly goes to show that the fact situation of each case is required to be considered and there can not be any wholesome or mechanical exercise of power while passing the final order under section 14(2) of the Act. It may be that inspite of the circular, the Registrar may find upon the fact situation of a particular society that it is not necessary or desirable to direct the amendment in the byelaws. For example, the society may be at a place where it has to bear all infractural expenses of maintaining common facilities like roads, lights etc whereas the location or yardsticks in respect of the society which is within the corporation may be different. Suffice it to say that each case of the society is to be independently considered objectively by the Registrar after taking into consideration the details available on

record. Primafacie, it appears that in all these matters, the Registrar has mechanically exercised the powers, that too without giving any opportunity of hearing to the concerned society and therefore such mechanical or general or wholesome exercise of power directing to register the amendment in the byelaws, in my view, can not stand in the eye of law. On true construction of section 14(2) of the Act it transpires that the power is to be exercised by the Registrar in each case separately, that too after giving opportunity of hearing and upon the facts and circumstances of such society. Therefore, the learned counsel for the petitioners are right in contending that there can not be any wholesome exercise of power or rather mechanical exercise of power for the purpose of giving directions to register the amendment in the byelaws under section 14(2) of the Act. However, the Registrar would be right in not registering the amendment in the byelaws which may not be in conformity with his tentative view under section 14(1) of the Act.

31. If the Registrar has issued notice under section 14(1) of the Act or rather when the matter is pending under section 14(1) of the Act regarding bringing uniformity of charging transfer fee as per circular the Registrar would be justified in refusing the amendment in the byelaws under section 13(2) of the Act and such an action of not registering the amendment in byelaws under section 13(2) of the Act until the final decision is taken under section 14(2) of the Act after the tentative decision under section 14(1) of the Act can not be said to be unreasonable or arbitrary, in any manner.

32. In view of the above discussion, the orders passed by the District Registrar in each case in respect of the petitioner society under section 14(2) of the Act for passing final orders of registering the amendment in the byelaws are hereby quashed and set aside.

33. It is made clear that those other societies which have accepted the order passed by the Registrar under section 14(1) or (2) of the Act will be entitled to continue with such byelaws.

34. The aforesaid clarification is made because it has been contended on behalf of the State Govt that a large number of societies in the State have accepted such amendment in the byelaws by accepting the orders passed by the Registrar under section 14(1) and (2) of the Act, as the case may be.

35. However, so far as the present petitioners are concerned, the matter shall be considered afresh by the Registrar under section 14(1) of the Act when the society concerned is called upon to amend the byelaws as per circular dated 13.2.19911 and thereafter if any of the petitioner-society declines or fails to carry out the amendment in the byelaws it would be open to the Registrar to consider the matter as per section 14(2) of the Act keeping in view the aforesaid observations and discussion made in this judgment and to pass final orders in accordance with law.

36. All these petitions are allowed to the aforesaid extent. Rule in each petition is made absolute accordingly. There shall be no order as to costs.

37. In view of the judgment in the main special civil applications, there shall be no order in Civil Application No. 14817/99 in Special Civil Application No.6706/91 and the same stands disposed of accordingly.

19.8.02 (JAYANT PATEL,J)